Aramin Sdn Bhd v Juta Rasmi (M) Sdn Bhd (Adam bin Mat Sam, Intervenor)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–23–66 OF 2003
ABDUL MALIK ISHAK J
6 APRIL 2005

Civil Procedure — Injunction — Interlocutory injunction — Application for — Whether there exists a serious question to be tried — Whether damages an adequate remedy — Balance of convenience

The plaintiff was appointed as the main contractor to build and construct 359 units of bungalows under a project (the 'said project'). The appointment of the plaintiff as the main contractor for the said project received the sanction of the Selangor State Government. The participants of the said project had been duly informed about the appointment of the plaintiff as the main contractor to the said project by way of a letter from the Gombak land office. In addition to that, all the parties involved in the said project were duly informed about the plaintiff's role. The 'Jawatankuasa Pembantu Penyelaras Projek' (the 'JKPPP') had consented to the appointment of the plaintiff as the main contractor to the said project and there it was also stated that the plaintiff was solvent and was capable of operating the said project. The plaintiff contended that the defendant had intruded and/or illegally entered and/or broke into the site of the said project and by virtue of that interference the plaintiff was unable to complete the said project. The plaintiff also contended that the defendant had refrained and/or had stopped the plaintiff from entering the site of the said project and, consequently, as a result thereof the plaintiff was unable to complete the said project. The plaintiff sought to obtain an interlocutory injunction to, *inter alia*, prevent the defendant from entering and/or staying at the construction site.

Held, dismissing the application:

(1) The plaintiff had been wound up and a stay was granted. Therefore, the plaintiff was an insolvent company. It served no useful purpose for the plaintiff to file an application to seek for injunctive reliefs when the plaintiff was in the red and was unable to complete the said project (see para 28).

(2) There was no serious question to be tried. The plaintiff had on their own accord withdrawn from being the contractor for the said project and had considered the agreements entered with the participants of the said project as being revoked. The plaintiff had abandoned the said project since 1999 (see para 34).

(3) The defendant was appointed by JKPPP as well as by the participants of the said project to replace the plaintiff and to complete the said project. A construction agreement was entered between the defendant and the participants of the said project. The defendant had even performed its legal obligations under the said project to the satisfaction of the participants. The plaintiff's application for injunctive reliefs had jeopardised the contract between the defendant and the participants of the said project (see para 34).

(4) To say that the plaintiff had a cause of action against the defendant based on the construction agreements with the participants of the said project would be to go against the doctrine of privity of contract. The defendant was not a party to the contract entered between the plaintiff and the participants of the said project (see para 34).

(5) The affidavit in support of the application for injunctive reliefs averred that there was a conspiracy to remove the plaintiff from being the contractor to the said project. Conspiracy is 'an actionable tort' and that 'the remedy for which is damages'. Consequently, as far as this action is concerned, damages would be an adequate remedy for the plaintiff and there was no justification for this court to grant the injunctive reliefs (see para 36); *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor (and another appeal)* [2003] 3 MLJ 522 followed.

(6) The balance of convenience lied in favour of the defendant. The said project was abandoned by the plaintiff. Under the defendant, the said project gained some momentum. The bank even released some payments on behalf of the participants to the said project. All the participants to the said project preferred the defendant. They wanted the defendant to build the bungalow houses for them. They have high expectations of the defendant (see para 38); *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 followed.

[**Bahasa Malaysia summary**

Plaintif telah dilantik oleh kontraktor utama untuk membina dan mendirikan 359 unit bungalow di bawah satu projek ('projek tersebut'). Pelantikan plaintif sebagai kontraktor utama untuk projek tersebut menerima sanksi Kerajaan Negeri Selangor. Peserta-peserta projek tersebut telah dimaklumkan terlebih dahulu tentang pelantikan plaintif sebagai kontraktor utama untuk projek tersebut melalui surat daripada pejabat tanah Gombak. Tambahan pula, semua pihak yang terlibat dalam projek tersebut telah dimaklumkan terlebih dahulu tentang peranan plaintif. Jawatankuasa Pembantu Penyelaras Projek ('JKPPP') telah membenarkan pelantikan plaintif sebagai kontraktor utama untuk projek tersebut dan ia juga dinyatakan bahawa plaintif adalah solven dan mampu mengendalikan projek tersebut. Plaintif berhujah bahawa

defendan telah mengganggu dan/atau masuk secara salah di sisi undang-undang dan/atau menceroboh masuk ke dalam kawasan projek tersebut dan berikutan gangguan tersebut, plaintif tidak dapat menyiapkan projek tersebut. Plaintif juga berhujah bahawa defendan menghalang dan/atau menahan plaintif daripada memasuki kawasan projek tersebut dan, berikutan itu, akibat daripadanya plaintif tidak dapat menyiapkan projek tersebut. Plaintif memohon untuk mendapatkan satu injunksi interlokutori untuk, antara lain, menghalang defendan daripada memasuki dan/atau tinggal di kawasan pembinaan.

Diputuskan, menolak permohonan tersebut:

(1) Plaintif telah digulung dan satu penggantungan telah diberikan. Oleh itu, plaintif adalah sebuah syarikat insolven. Tiada gunanya plaintif memfailkan satu permohonan untuk memohon relif injunksi apabila plaintif tidak layak dan tidak mampu menyiapkan projek tersebut (lihat perenggan 28).

(2) Tiada persoalan serius untuk dibicarakan. Plaintif dengan sendirinya menarik diri daripada menjadi kontraktor untuk projek tersebut dan telah menganggap perjanjian yang dimasuki dengan peserta-peserta projek tersebut sebagai dibatalkan. Plaintif telah meninggalkan projek tersebut sejak tahun 1999 (lihat perenggan 34).

(3) Defendan telah dilantik oleh JKPPP dan juga peserta-peserta projek tersebut untuk menggantikan plaintif dan untuk menyiapkan projek tersebut. Satu perjanjian pembinaan telah dimasuki antara defendan dan peserta-peserta projek tersebut. Defendan juga telah melaksanakan tanggungjawabnya di sisi undang-undang di bawah projek tersebut dengan memuaskan. Permohonan plaintif untuk relief injunksi telah menganggu kontrak antara defendan dan peserta-peserta projek tersebut (lihat perenggan 34).

4) Untuk mengatakan bahawa plaintif mempunyai kausa tindakan terhadap defendan berdasarkan perjanjian-perjanjian pembinaan dengan peserta-peserta projek tersebut adalah bertentangan dengan doktrin priviti kontrak. Defendan bukan pihak kepada kontrak yang dimasuki antara plaintif dan peserta-peserta projek tersebut (lihat perenggan 34).

(5) Afidavit sokongan permohonan untuk relief injunksi menegaskan bahawa terdapat konspirasi untuk mengeluarkan plaintif sebagai kontraktor kepada projek tersebut. Konspirasi adalah suatu tort dan remedinya adalah ganti rugi. Berikutan itu, setakat mana tindakan ini adalah berkaitan, ganti rugi adalah remedi yang mencukupi untuk plaintif dan tiada justifikasi untuk mahkamah ini membenarkan relief injunksi tersebut (lihat perenggan 36); *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor (and another appeal)* [2003] 3 MLJ 522 diikut.

(6) Imbangan kesesuaian terletak menyebelahi defendan. Projek tersebut terbengkalai disebabkan plaintif. Di bawah pengendalian defendan, projek tersebut dapat dijalankan semula. Bank juga telah memberikan bayaran bagi pihak peserta-peserta kepada projek tersebut. Semua peserta kepada projek tersebut lebih menyukai defendan. Mereka inginkan defendan membina rumah-rumah bungalow tersebut untuk mereka. Mereka mempunyai harapan tinggi terhadap defendan (lihat perenggan 38); *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 diikut.]

Notes

For cases on interlocutory injunction, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794.

For interlocutory injunctions generally, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) para [10.5–027].

Cases referred to

Adamson v Wilson (1864) 10 LT 24 (refd)
AG v Colchester Corp [1955] 2 QB 207; [1955] 2 All ER 124 (refd)
AG v London and South Western Railway Co (1849) 3 De G & Sra 439 (refd)
American Cyanamid Co v Ethicon Ltd [1975] AC 396, [1975] 1 All ER 504 (folld)
Associated Newspapers Group plc v Insert Media Ltd [1988] 2 All ER 420 (refd)
Baxter v Claydon [1952] WN 376 (refd)
Castle Fitness v Manz [1990] 1 MLJ 141 (refd)
Chappell v Davidson (1856) 8 De GM & G 1 (refd)
Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tze [1977] 1 MLJ 56 (refd)
Dowty Boulton Paul Ltd v Wolverhampton Corp [1971] 2 All ER 277; [1971] 1WLR 204 (refd)
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (refd)
Elliot v North Eastern Railway Co (1863) 10 HL Cas 333 (refd)
Eng Mee Yong v Letchumanan [1980] AC 331; [1979] 2 MLJ 212 (refd)
Graham v Campbell (1878) 7 Ch D 490 (refd)
Hong Kong Vegetable Oil Co Ltd v Malin Sirinaga Wicker [1978] 2 MLJ 13 (refd)
*Lian Keow Sdn Bhd v Overseas Credit Finance (M) Bh*d [1982] 2 MLJ 162 (refd)
*Locabail International Finance Ltd v Agroexport and others The Sea Ha*wk [1986] 1All ER 901 (refd)
Newby v Harrison (1861) 3 De GF & J 287 (refd)
North Eastern Railway Co v Crossland (1862) 2 John & H 565 (refd)
Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor (and Another Appeal) [2003] 3 MLJ 522 (folld)
RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd [1991] 1 MLJ 309 (refd)
Redland Bricks Ltd v Morris [1970] AC 652, [1969] 2 All ER 576 (refd)
Shepherd Homes Ltd v Sandham [1970] 3 All ER 402 (refd)
Smith v Day (1882) 21 Ch D 421 (refd)
Teign Valley Railway Co v Southwood (1871) 19 WR 690 (refd)

The New Straits Times Press (M) Bhd v Airasia Bhd [1987] 1 MLJ 36 (refd)
The Siskina [1977] 3 All ER 803 (refd)
Tuck v Silver (1859) John 218 (refd)
Tucker v New Brunswick Trading Co of London (1890) 44 Ch D 249 (refd)
Vere v Minter (1914) 49 L Jo 129 (refd)
Wakefield v Duke of Buccleugh (1865) 11 Jur NS 523 (refd)
Warwickshire County Council v British Railways Board [1969] 3 All ER 631, [1969] 1 WLR 1117 (refd)
Yogananthy a/p AS Thambaiya v Idris bin Osman [1996] MLJU 240 (refd)

Shauki bin Alizan (Armiy Rais, Ong, Wong & Ng) for the plaintiff.
Mariatinawati bte Yusoff (Rozali Ismail & Co) for the defendant.
Amir Asree bin Meor Nordin (Zaidah Paramjit & Associates) for the Intervenor.

Abdul Malik Ishak J:

[1] By way of enc 5, the plaintiff seeks for the following orders:

(1) An interlocutory injunction to prevent the defendant from either acting through its directors, servants, agents or any one of them or all of them from entering and/or staying at the construction site.

(2) An interlocutory injunction to prevent the defendant from either acting through its directors, servants, agents or any one of them or all of them from claiming and/or taking monies for the construction of the houses that have been built or the construction of the houses that would be built.

(3) An interlocutory injunction to prevent the defendant from either acting through its directors, servants, agents or any one of them or all of them from continuing to publish defamatory statements or any other statements to the like effect about the plaintiff.

(4) Any other related orders and/or other orders which this court deems fit.

(5) Costs of this application is to be borne by the defendant.'

[2] My immediate predecessor had on 1 March 2004 granted the intervenor's application to intervene in encl 9 and he too granted a holding over injunction in favour of the plaintiff on that day.

THE LAW

[3] The plaintiff is seeking an interlocutory injunction which is entirely a discretionary equitable remedy awarded by the judge under certain restrictive conditions in order to restrain whatever imminent and impending threat or to restrain the commission or continuance of an unlawful act and such an

injunction is called a prohibitory injunction; or to compel the opposite party to take the necessary steps in order to rectify an unlawful omission or to restore the damage inflicted by an unlawful act and such an injunction is called a mandatory injunction. It is perhaps ideal to refer to the case of *Redland Bricks Ltd v Morris* [1970] AC 652, [1969] 2 All ER 576, HL which expounds the relevant principles pertaining to an award of mandatory injunctions.

[4] It is trite law that an injunction will not be issued by the court in order to secure the provision of certain services or works which the court cannot effectively superintend or supervise. The classic examples would be the following cases:

(a) where the court will refrain from granting a mandatory injunction for the purpose of ordering the continuance of a ferry service (*AG v Colchester Corp* [1955] 2 QB 207; [1955] 2 All ER 124); and

(b) where the court will refuse to grant a mandatory injunction which requires the maintenance of an airfield (*Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 2 All ER 277; [1971] 1 WLR 204).

[5] But, in exceptional cases, the courts have been magnanimous and have granted prohibitory injunctions in order to restrain the invalid closures of certain railway lines (*Warwickshire County Council v British Railways Board* [1969] 3 All ER 631, [1969] 1 WLR 1117, (CA)).

[6] It is also trite law that the court will not grant an injunction where damages are an appropriate and an adequate remedy.

[7] Now, to entitle a particular plaintiff to an interlocutory injunction it is necessary for that plaintiff to satisfy the court that his claim is indeed not frivolous or vexatious and that there is in fact a serious question to be tried (see the House of Lords decision in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, (HL)).

[8] Since it is the discretionary power of the court whether to grant an interlocutory injunction, everything would be dependent on the facts of the case. In the past, the courts have granted an injunction couched in extensive terms (*AG v London and South Western Railway Co* (1849) 3 De G & Sra 439 at 445; *North Eastern Railway Co v Crossland* (1862) 2 John & H 565 at 580; and *Elliot v North Eastern Railway Co* (1863) 10 HL Cas 333). In *Vere v Minter* (1914) 49 L Jo 129, the court was concerned with an action for obstruction of light and the court granted an injunction in general terms to the extent that the court refused to limit the injunction in order to restrain the defendant from building in a way other than in accordance with an altered plan as submitted by him which he alleged would not cause an actionable obstruction.

[9] The person who applies for an interlocutory injunction has to give an undertaking as to damages and such an undertaking ought to be given in every case (*Chappell v Davidson* (1856) 8 De GM & G 1; *Tuck v Silver* (1859) John 218; *Adamson v Wilson* (1864) 10 LT 24; *Wakefield v Duke of Buccleugh* (1865) 11 Jur NS 523; *Teign Valley Railway Co v Southwood* (1871) 19 WR 690; *Graham v Campbell* (1878) 7 Ch D 490, (CA); and *Smith v Day* (1882) 21 Ch D 421, (CA)). In an undertaking, the party that obtains the order undertakes to abide by the order of the court as to damages which the court may make. The underlying purpose of such an undertaking is to vest in the court with the necessary jurisdiction to make the appropriate order in the event it is later found that the court has made the wrong decision when granting the injunction. In such a situation, with that undertaking in place, the court may make the appropriate order in order to compensate the loss sustained by the other party (*Newby v Harrison* (1861) 3 De GF & J 287; and *Baxter v Claydon* (1952) WN 376). Clearly, therefore such an undertaking will benefit the defendant tremendously (*Tucker v New Brunswick Trading Co of London* (1890) 44 Ch D 249, (CA)).

[10] Under the *American Cyanamid* principles, the plaintiff who is the applicant has to show to the court that:

(i) there is a serious question to be tried;

(ii) if the plaintiff applicant were to succeed at the trial, damages would not be an adequate compensation for its loss;

(iii) the balance of convenience lies in favour of the plaintiff applicant; and

(iv) there are special circumstances in favour of the plaintiff applicant or no special circumstances in favour of the opposite party - referring to the defendant respondent. Once the plaintiff can show to the court that he has a cause of action recognised in law and that it is just and convenient to grant the interlocutory injunction, the court will grant him the order (*The Siskina* [1977] 3 All ER 803).

[11] In regard to the question of granting an interim injunction in a defamation action, the popular view is that the court will be slow in granting such a relief. The Supreme Court in *The New Straits Times Press (M) Bhd v Airasia Bhd* [1987] 1 MLJ 36 categorically states that an interim injunction shall not be granted where the defence raised is one of justification, fair comment or privilege unless the alleged defamatory statements were 'obviously untruthful'.

[12] So much for the brief discourse on the law. I will now narrate the facts of the case.

FACTS OF THE CASE

[13] By letter dated 30 October 1999 from the Gombak land office, the plaintiff was appointed as the main contractor to build and construct 359 units of bungalows under a project known as the 'Projek Pembangunan Kampung Tersusun dan Berkelompok' (hereinafter referred to as the 'said project') located at Batu 29 1/2 , Jalan Batang Berjuntai, Mukim Rawang, Selangor Darul Ehsan. The appointment of the plaintiff as the main contractor for the said project received the sanction of the Selangor State Government at its meeting held on 22 September 1999.

[14] The participants of the said project had been duly informed about the appointment of the plaintiff as the main contractor to the said project by way of a letter dated 22 February 2000 from the Gombak land office. In addition to that, all the parties involved in the said project were duly informed about the plaintiff's role. Even the 'Jawatankuasa Pembantu Penyelaras Projek' (hereinafter referred to as the 'JKPPP') had, by way of a letter dated 2 November 1995, admitted the appointment of the plaintiff as the main contractor for the said project. By way of a letter dated 22 August 1994 to SHS Consultant Architect, JKPPP had consented to the appointment of the plaintiff as the main contractor to the said project and there it was also stated that the plaintiff was solvent and was capable of operating the said project.

[15] It was the stand of the plaintiff that the defendant had intruded and /or illegally entered and/or broke into the site of the said project and by virtue of that interference the plaintiff was unable to complete the said project. It was also the stand of the plaintiff that the defendant had refrained and/or had stopped the plaintiff from entering the site of the said project and, consequently, as a result thereof the plaintiff was only able to complete the construction of 52 bungalow houses out of the grand total of 359 bungalow houses that were supposed to be built and completed by the defendant. It is said that the defendant is still occupying and/or intruding into the site of the said project and as a result thereof the plaintiff has been restrained from entering the site of the said project. It is said that the defendant had claimed the sum of RM250,000 from the owners of the bungalows without the knowledge of the plaintiff. According to the plaintiff, it is this very amount that has to be collected by the plaintiff in order to build and finance the said project and that the failure to collect such sums would lead to the plaintiffs failure to complete and build the bungalows on the said project within the specified time.

[16] According to the plaintiff, the defendant had made defamatory statements and had alleged that the plaintiff had failed to complete the construction of the said project and had relinquished its entitlement to develop and complete the said project. It is the stand of the plaintiff that these derogatory statements emanating from the defendant were untrue and that it had caused all the participants in the said project to have a negative perspective and have a bad impression of the plaintiff.

[17] It is also said that the defendant had written defamatory letters to all the participants as well as to the Gombak district officer alleging that the plaintiff had withdrawn itself from being the main contractor of the said project. These letters too contained an averment that all the agreements entered between the plaintiff and the other parties in the said project to be invalid and void. As a result of the defendant's defamatory letters, the participants of the said project had signed a new agreement to appoint the defendant as their new main contractor. According to the plaintiff, what the defendant had done was wrong in law and should be frowned upon.

[18] For all these reasons, the plaintiff sought for the injunctions as specified in encl 5.

[19] Not to be outwitted, it is the stand of the defendant that it is a company appointed by the JKPPP to develop bungalows on the said project. In addition to the original 359 participants to the said project, there were 273 other participants and together cumulatively they entered into a construction agreement with the defendant to develop bungalow houses on the said project.

[20] According to the defendant, its appointment as the new contractor for the said project was made voluntarily by the participants of the said project when the plaintiff failed to complete the said project and had abandoned it since April 2000. It is said that JKPPP had sent a letter to the Selangor State Exco vide their letter dated 24 November 2001 requesting that the participants to the said project be given a mandate to appoint a new contractor to continue and complete the abandoned project left by the plaintiff. But to date, it is said that there is no response to that letter at all. Notwithstanding the lack of response of the Selangor State Exco, the participants of the said project together with JKPPP agreed to appoint the defendant to continue the said project and such a resolution was made at a meeting between the Gombak land office and the Gombak district office according to the minutes of that meeting dated 27 March 2002. It is said that the appointment of the defendant as the new contractor for the said project was supported by an affidavit affirmed by the chairman of JKPPP as seen in encl 10.

[21] It is apparent that there is a tussle between the parties as to who is the rightful contractor to the said project. What is obvious is this. The Selangor State Exco has not given its mandate to appoint the defendant as the new contractor to the said project. For all intents and purposes, it is the plaintiff who is still the main contractor to the said project. And that seems to be the main plank of the argument of the plaintiff. But the facts does not end there. A perusal of the affidavits reveal the following state of affairs.

[22] Enclosure 8 is the affidavit of the intervenor that was affirmed on 4 November 2003. It certainly makes for an interesting reading material. There it shows that all the participants who are the land owners in the said project

wanted the defendant to continue with the said project to the exclusion of the plaintiff. There it states that they have entered into a building contract with the defendant after the plaintiff had withdrawn from proceeding with the said project. There it also avers that the injunction would seriously jeopardise the rights and interests of the participants in the said project and that the said project had stalled indefinitely. There it avers that the interests of the participants in the said project would be seriously prejudiced when they are forced to pay the progressive payments inclusive of interests to the financial institutions that financed the said project. There it states that the rights of the participants in the said project must be protected against the injunction which the plaintiff sought since the injunction would prevent the defendant from completing the said project. There it avers categorically that the injunctive reliefs sought by the plaintiff would have an impact on the participants of the said project in the sense that it would deprive them of their dream to own their own houses on their own piece of land when the defendant is prevented from completing the said project according to schedule. All these averments can be seen in para 24(a) to para 24(h) of encl 8.

[23] Muzarina bte Mohamad wrote two letters which must be alluded to. The first letter was dated 19 January 2001 addressed to all the participants in the said project and it can be seen in exh 'AMS–4' of encl 8 and there she stated categorically that the plaintiff has withdrawn as a contractor for the said project and that all agreements pertaining thereto must be considered as being revoked. The second letter was dated 23 January 2001 and it was addressed to the Gombak district officer and this too can be seen in exh 'AMS–4' of encl 8 and there she repeated and reiterated that the plaintiff has withdrawn from being the contractor of the said project and that all the agreements in relation to the said project must be construed as being revoked. In the second letter too she left the fate of the said project in the hands of the district officer and she too reiterated that the plaintiff was no longer involved in the said project.

[24] Unfortunately, the stings of the two letters emanating from Muzarina bte Mohamad were whittled down by the fact that the lady in question had in fact resigned as a director of the plaintiff with effect from 28 July 2000 as reflected in exh 'AHT–6' of encl 4. Be that as it may, the averments in the affidavit of the intervenor as reflected in encl 8 showed beyond per adventure that the participants of the said project had entered into a new contract with the defendant for completion of the houses left abandoned by the plaintiff. Surely the voice of the majority must be heard and heeded to.

[25] At any rate, a letter addressed to the Gombak land administrator from the previous solicitors dated 14 May 2000 as seen in exh 'AMS–6' of encl 8 revealed that the solicitors in question had prepared the agreements between the participants and the plaintiff for the said project. It also showed that:

(a) the agreements were signed by the parties in the early part of 1995 till the end of 1997;

(b) the completion date for the said project would be within 24 months and that would be at the end of 1997 until 1999;

(c) the plaintiff had by letter dated 19 January 2001 confirmed that it would not carry out its obligations under the agreements between the parties pertaining to the said project (this must be in reference to the letter from Muzarina bte Mohamad); and

(d) the plaintiff had, based on the letter dated 19 January 2001, breached the terms of the agreements entered with the participants of the said project (this is also in reference to the letter from Muzarina bte Mohamad).

[26] One thing is certain. The said project was supposed to have been completed by the end of 1997 until 1999 but it did not turn out to be so. It is now 2005 and the said project has stalled for that period of time.

[27] There is also another letter dated 30 March 2002 from the JKPPP and it can be seen in exh 'AMS–7' of encl 8. That letter resolved, *inter alia*, that:

(a) the meeting that took place on 27 March 2002 between the Gombak land office and JKPPP arrived at a decision that the plaintiff had failed to complete the said project and that the said project had been abandoned since 1999; and

(b) the defendant is to continue the said project as a new contractor with the hope that it will be able to complete it successfully.

[28] Of pertinence would be the fact that the plaintiff has been wound up on 7 December 2001 and a stay was granted on 17 March 2003. This clearly shows that the plaintiff is an insolvent company. It serves no useful purpose for the plaintiff to file encl 5 seeking for those injunctive reliefs when the plaintiff is in the red and is unable to complete the said project. In fact, the evidence shows that the said project has been abandoned since 1999. The participants of the said project must have suffered tremendously waiting for all those years for their houses to be built by the plaintiff. There is now a clamour by the participants of the said project that the defendant should be their new contractor. The averments in para 24(a) to para 24(h) of encl 8 as alluded to earlier pertaining to the desire of the participants in the said project for the defendant to be their new contractor have not been challenged by the plaintiff by way of an affidavit and this makes the plaintiff's application for an injunction in encl 5 all the more weaker.

[29] It is also pointless for the plaintiff to enjoy the holding over injunction pending the disposal of encl 5.

ANALYSIS

[30] I have in the early part of this judgment alluded to the case of *American Cyanamid* and that case receives the approval of the courts in Malaysia and in Singapore as reflected in the following cases:

(1) *Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tze* [1977] 1 MLJ 56;

(2) *Hong Kong Vegetable Oil Co Ltd v Malin Sirinaga Wicker* [1978] 2MLJ 13; and

(3) *Lian Keow Sdn Bhd v Overseas Credit Finance (M) Bh*d [1982] 2MLJ 162.

[31] I too have generously applied the *American Cyanamid* principles in the case of *Yogananthy a/p AS Thambaiya v Idris bin Osman* [1996] MLJU 240. Even the Privy Council in *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 2 MLJ 212 has done so.

[32] I will now examine the present application in encl 5 under the following heads, in line with the principles as enunciated in the *American Cyanamid*.

IS THERE A SERIOUS QUESTION TO BE TRIED?

[33] It must be emphasised that the plaintiff must have a cause of action before this court will grant the plaintiff any remedy. If the plaintiff cannot show to this court that it has a valid cause of action, the plaintiff's application must fail in limine (*Associated Newspapers Group plc v Insert Media Ltd* [1988] 2 All ER 420; and *RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd* [1991] 1 MLJ 309). But, if the plaintiff can show that prima facie it has a valid cause of action, the plaintiff need not go on to show that it will definitely succeed in that cause of action. All the plaintiff needs do would be to show that there is a serious question to be tried.

[34] I would venture to answer the question posed in the negative. There is no serious question to be tried in this case. The following reasons would suffice:

(1) It must be recalled to mind that the plaintiff had on their own accord withdrawn from being the contractor for the said project and had considered the agreements entered with the participants of the said project as being revoked. The plaintiff too had left the fate of the said project in the hands of the district officer and was no longer interested in the said project. All these averments were forwarded by Muzarina bte Mohamad by letters dated 19 January 2001 and 23 January 2001 notwithstanding the fact that she had resigned as a director of the plaintiff with effect from 28 July 2000. Without the benefit of a full trial, Muzarina bte Mohamad's two letters must be read in the context of the

whole case especially the fact that the said project has been abandoned since 1999 by the plaintiff. It is part and parcel of my judgment that the plaintiff has abandoned the said project since 1999.

(2) The defendant was appointed by JKPPP as well as by the participants of the said project to replace the plaintiff and to complete the said project. For this very purpose, a construction agreement was entered between the defendant and the participants of the said project. The defendant has even performed its legal obligations under the said project to the satisfaction of the participants bearing in mind that the latter wanted the defendant to be their new contractor.

(3) To say that the plaintiff has a cause of action against the defendant based on the construction agreements with the participants of the said project would be to go against the doctrine of privity of contract. The defendant was not a party to the contract entered between the plaintiff and the participants of the said project. Lord Haldane LC in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853 aptly said:

> ... in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* (a right of a third party) arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

With respect, that is also the law in Malaysia. What Lord Haldane LC said in that case may be summarised as follows:

(a) that a stranger to a contract cannot sue upon it; and

(b) that a stranger to the consideration cannot, in law, sue upon the contract.

(4) It must be recalled that the defendant had entered into a construction agreement with the participants of the said project. By filing encl 5 and seeking those injunctive reliefs would stifle the contract in existence between the defendant and the participants of the said project. Put in another way, the plaintiff's application for injunctive reliefs in encl 5 has jeopardised the contract between the defendant and the participants of the said project. It is akin to asking the defendant to breach its contractual obligations with the participants of the said project.

(5) The plaintiffs allegation that the defendant had defamed the plaintiff does not give rise to a reasonable cause of action because:

A (a) the plaintiff failed to particularise the details of the defamation; and

(b) the reliance on the part of the plaintiff on exhs 'ART–5", 'AHT–8' and 'AHT–10' of encl 4 was certainly misplaced because those exhibits were not authored by the defendant.

B IF THE PLAINTIFF APPLICANT WERE TO SUCCEED AT THE TRIAL, DAMAGES WOULD NOT BE AN ADEQUATE COMPENSATION FOR ITS LOSS

[35] It is the duty of the court to consider whether damages would be an adequate remedy for the plaintiff. It is also the duty of the court to consider C the adequacy of the damages from the standpoint of the defendant and, at the same time, to determine and consider whether the loss which the defendant may suffer would adequately be compensated by an award of damages based on the plaintiffs undertaking as to damages. So, if the plaintiff's potential loss can adequately be compensated by an award of damages then encl 5 would not be entertained by this court.

D **[36]** The affidavit in support in encl 4 averred that there was a conspiracy between the defendant, JKPPP and Muzarina bte Mohamad to remove the plaintiff from being the contractor to the said project. Conspiracy has been held by the Court of Appeal in the case of *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor (and Another Appeal*) [2003] 3 MLJ E 522 to be 'an actionable tort' and that 'the remedy for which is damages'. Consequently, as far as this action is concerned, damages would be an adequate remedy for the plaintiff and there is no justification for this court to grant the injunctive reliefs as sought for in encl 5.

F WHERE DOES THE BALANCE OF CONVENIENCE LIE?

[37] This involves a factual exercise. Everything depends on the facts of the case.

[38] It is my judgment that the balance of convenience lies in favour of the G defendant. It must be recalled that the said project was abandoned by the plaintiff in 1999. Everything came to a standstill. It was God's send when the defendant came to the scene, so to speak. Under the defendant, the said project gained some momentum. The bank even released some payments on behalf of the participants to the said project. All the participants to the said H project preferred the defendant. They wanted the defendant to build the bungalow houses for them. They have high expectations of the defendant. It looks like the said project would be completed by the defendant according to schedule.

I ARE THERE SPECIAL CIRCUMSTANCES IN FAVOUR OF THE PLAINTIFF?

[39] I would answer this question in the negative. I venture to advance the following reasons:

(a) The plaintiff has abandoned the said project to the chagrin of the participants. The defendant has subsequently been appointed to take over the said project.

(b) There is no contractual relationship in existence between the plaintiff and the defendant in order to warrant this court to grant encl 5 in favour of the plaintiff.

(c) The defendant has succeeded in turning around the said project for the benefit of the participants. No reasons were advanced by the plaintiff as to why they were applying for an injunction against the defendant.

(d) Since 14 May 2001, the defendant continued with the said project and it would be for the benefit of the participants to allow the defendant to continue constructing the bungalow houses there.

(e) The bank loan has been approved and monies have been released to finance the said project. If the status quo is not maintained, all the participants will suffer. The said project should continue to be run by the defendant.

(f) The plaintiff has come to court with unclean hands. It is the plaintiff's own doing that had caused the said project to stall indefinitely. Injunctive reliefs ought not to be granted to the plaintiff.

(g) The undertaking as to damages given by the plaintiff as reflected in para 33 of encl 4 — the affidavit in support of encl 5, must be construed to be both inadequate and insufficient. It was not worth 'powder and shot'. It was a bare undertaking and nothing else. It must be borne in mind that the plaintiff has been ordered to be wound up on 7 December 2001 by the commercial court vide D4–28–616 of 2001 and a stay of that winding-up order was eventually granted on 17 March 2003. I was not advised whether the plaintiff has filed an appeal to the Court of Appeal against that order of winding-up. There was also no audited account of the plaintiff exhibited as an exhibit in the plaintiffs affidavit, be it in encl 4 or in encl 14. There was an averment by the plaintiff in the affidavit in reply in encl 14 at para 32 that Malayan Banking Berhad has approved a loan for the sum of RM12 million and the letter from Malayan Banking Bhd dated 11 March 2000 has been exhibited as exh 'AHT–21' to encl 14. The deponent affirmed the affidavit in reply in encl 14 on 13 December 2003. Indeed if it was true that Malayan Banking Bhd had approved a loan to the plaintiff to the tune of RM12 million on 11 March 2000 why then was

the plaintiff wound up on 7 December 2001? Surely with the sum of RM12 million loaned by Malayan Banking Bhd, the plaintiff would be able to pay off its debt and prevent itself from being wound up. Before me, the learned counsel for the plaintiff was not able to enlighten this court as to the current financial standing of the plaintiff. I do not see any reason as to why this court should require fortification of the undertaking by way of a payment of a sum of money into court or by way of a bank guarantee (*Castle Fitness v Manz* [1990] 1 MLJ 141). The plaintiff has been wound up and its current financial standing is suspect. The plaintiff has failed to produce credible evidence to demonstrate that it is still able to carry out the said project financially for the benefit of the participants. Having abandoned the said project in 1999, the plaintiff's application in encl 5 ought to be dismissed with costs.

(h) There is the failure on the part of the plaintiff to make full and frank disclosure of all the facts when it applies for those injunctive reliefs in encl 5. The affidavit in support in encl 4 did not state that the plaintiff was wound up on 7 December 2001 and that the stay was granted on 17 March 2001. In encl 4 also, the plaintiff did not reveal that it has left the site of the said project nor did it reveal that it has abandoned the said project. In an attempt to remedy the non-disclosure of the winding-up of the plaintiff, the plaintiff annexes as exh 'AHT–22' to the affidavit in reply in enc 14 the order of the court dated 17 March 2003 in order to show that the winding-up order was stayed. With respect, that was too late in the day.

[40] All the salient facts should have been disclosed in the affidavit in support in encl 4.

OBSERVATIONS

[41] On perusal of encl 5, what the plaintiff seeks is for an interlocutory mandatory injunctions and so it may be argued that the ordinary *American Cyanamid* principles are not applicable. This immediately brings to mind the case of *Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402 at 412 where Megarry J said:

> In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

[42] This is now known as the Megarry J's test and it has since been approved by the English Court of Appeal in the case of *Locabail International Finance Ltd v Agroexport and others The Sea Ha*wk [1986] 1 All ER 901. There the English Court of Appeal said at page 906 of the report:

> ... the statement of principle by Megarry J in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the *Cyanamid* case. The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

[43] As I see it, the plaintiff has to show to this court in order to succeed in encl 5 that it has an unusually strong and clear case and that there are special circumstances in the plaintiff's favour. I have examined the facts of the present case in extenso as alluded to earlier and nothing good turned out for the plaintiff. This is not an unusually strong and clear case for the plaintiff and there are no special circumstances to highlight for the plaintiff.

CONCLUSION

[44] For the reasons as adumbrated above, I must dismiss the plaintiff's application in encl 5 with costs.

Plaintiff's application dismissed with costs.

Reported by Peter Ling